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**Attorney General**
**Betty D. Montgomery**

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April 4, 2002

VIA OVERNIGHT DELIVERY
Office of the Secretary
Magalie Roman Salas
Federal Communications Commission
445 Twelfth Street, N.W.
Portals II Building
Washington, DC 20554

Re: *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* CC Docket Nos. 01-338, 96-98, and 98-147.

Dear Ms. Salas

Enclosed, please find the original and thirteen copies of the Comments of the Public Utilities Commission of Ohio in the above captioned matter.

Please return one stamped copy in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

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APR 5 - 2002

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | | |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

# COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

## I. INTRODUCTION AND BACKGROUND

On December 20, 2001, the Federal Communications Commission (FCC) released a notice of proposed rulemaking (NPRM) in the above-captioned proceedings. The FCC's NPRM initiates its first triennial review of the policies for the incumbent local exchange carriers' (ILECs') provision of unbundled network elements (UNEs) to competitive local exchange carriers (CLECs). The FCC invites comments regarding under which circumstances the ILECs must make parts of their networks available to CLECs consistent with section 251 of the Telecommunications Act of 1996 (1996 Act). The FCC also invites comments regarding the UNE platform (UNE-P) and the provision of UNE combinations. Comments in this proceeding are due on Monday, March 18, 2002. The Public Utilities

Commission of Ohio (Ohio commission) hereby submits its comments and recommendations responding to the NPRM.

In its previous comments to the FCC regarding the ILECs' provision of UNEs to competing local carriers, the Ohio commission indicated that FCC should adopt a default list of UNEs that would be modified or supplemented by State commissions pursuant to FCC guidelines. The Ohio commission advocated that certain UNEs be removed from the default list, including unbundled local switching. The Ohio commission believed that exclusion of the switch was appropriate under the "necessary" and "impair" standards and that its removal would promote facilities-based competition. Indeed, the FCC's *UNE Remand Order* partially eliminated unbundled switching for multi-line customers in the densest areas of the largest markets.

After three additional years of rendering arbitration-related decisions, the Ohio commission remains convinced that the FCC should establish a flexible list of UNEs to which State commissions would be able to include additional elements or eliminate elements based on FCC guidelines. Those guidelines should incorporate consideration of, among other things, the individual CLEC's operating location, individual CLEC business plans, class of customer served, and length of time a CLEC is in a particular market. More specifically, since State commissions are more familiar with the issues that should be considered regarding the ILECs' provision of UNEs, adding or subtracting UNEs from the FCC's default list should occur in State commission proceedings. The Ohio commission further notes that it would be impractical for the

FCC to adopt a one-size-fits-all national approach to the provision of ILEC UNEs to competing carriers. More specifics regarding the Ohio commission's position on this matter follow.

## II. DISCUSSION

### A. Criteria for Determining UNEs Under the "Necessary" and "Impair" Standards

Consistent with 47 U.S.C. § 251(d)(2) and the Supreme Court's decision in *AT&T v. Iowa Utilities Board,* 525 U.S. 366 (1999), the FCC's *UNE Remand Order* included several primary factors to be considered relative to the "necessary" and "impair" standards: (1) the costs incurred using alternatives to the incumbent's network, (2) delays caused by use of alternative facilities, (3) material degradation in service quality, (4) the ability of a requesting carrier to serve customers ubiquitously using its own facilities or those acquired from third-party suppliers, and (5) the impact that self-provisioning a network element or obtaining it from a third-party supplier may have on network operations. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking ("*UNE Remand Order*"), 15 FCC Rcd. 3696, 3766, (1999) at ¶¶ 72-99.

In addition to the primary factors that are based on the explicit "necessary" and "impair" tests found in the statute, the NPRM also discussed additional considerations. The original *UNE Remand Order* also considered these additional factors including: (1) whether an unbundling obligation is likely to promote the rapid introduction of competition in all markets, (2) whether the obligation will promote facilities-based

competition, (3) the extent to which the FCC can reduce regulatory obligations as alternatives to the incumbent's network becomes available, and (4) whether the unbundling requirements will provide uniformity and predictability to new entrants and market certainty in general, and (5) whether the unbundling obligations are administratively practical. *UNE Remand Order* at ¶¶ 107-116.

Similarly, the current NPRM concludes that, while Section 251(c)(3) incorporates the "necessary" and "impair" standards as mandatory baseline factors, that statute also contemplates that the FCC could consider additional standards prior to designating a particular network element as a required UNE. NPRM at ¶ 21. This conclusion is based on the statutory language that requires the FCC to consider *"at a minimum"* the "necessary" and "impair" standards. The Ohio commission agrees that additional factors listed above should be considered beyond the "necessary" and "impair" standards.

All of the same primary and additional factors used in the *UNE Remand Order* are again referenced in the current NPRM, and the FCC seeks comment on whether to continue using them. NPRM at ¶¶ 7-9, 19, 21. The Ohio commission believes all of the factors listed in the original *UNE Remand Order* and again referenced in the current NPRM continue to be relevant. Thus, the Ohio commission maintains that it is appropriate for the FCC (in conjunction with State commissions) to utilize all of the major factors referenced in the NPRM.

Although the Ohio commission does not propose a specific test for this purpose in these comments, it believes that the FCC should utilize the factors discussed in the

NPRM to formulate a set of guidelines/standards that could be followed by State commissions. Of the primary factors discussed, the PUCO continues to believe the most important factors are the availability and cost of UNE-type services provided by non-incumbent LEC sources (including the requesting carrier's self-provision of UNEs).

In the context of considering additional factors besides the "necessary" and "impair" standards, the FCC specifically sought comment on the benefits of facilities-based competition as compared to other forms of competition. NPRM at ¶ 25. The Ohio commission believes that a an important consideration in designating UNEs should be whether facilities-based competition is promoted. The most prevalent debate in this regard relates to availability of the UNE-P, which only remains available if all of the underlying UNEs remain available (*i.e.*, unbundled loops, switches, and transport elements). The Ohio commission has faithfully implemented the UNE-P as structured in the *UNE Remand Order.* The Ohio commission has established wholesale rates for Ameritech, using the TELRIC methodology, that are among the very lowest in the entire country, according to a recent NRRI survey. *See* http://www.nrri.ohio-state.edu/programs/telcom/xls/UNE_Matrix_1-02.XLS. Not reflected in that survey, the Ohio commission more recently ordered Ameritech to provide an additional discount to the residential ULS port rate by $1.50 per month for 24 months. *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio,* PUCO Case No. 99-938-TP-COI (January 31, 2002 Second Supplemental Opinion and Order) at 46.

This example of the UNE-P in Ohio is offered to illustrate application of the "necessary" and "impair" standards. If CLECs are not currently attracted to serve the

mass market using the UNE-P at the low cost-based rates established in Ohio, then it would appear that the UNE-P may not be a viable market entry strategy. If that is the case, there may be no reason to maintain the UNE-P. Alternatively, if CLECs are attracted to the market conditions in Ohio using the UNE-P to serve the mass market, the Ohio commission believes that the UNE-P should not be significantly relied upon to achieve sustainable competition. Indeed, the Ohio commission believes that the UNE-P should be used as a temporary or transitional market entry strategy —it is not a viable long-term solution for facilities-based local competition. Consequently, even if it becomes increasingly utilized to serve the mass market, the UNE-P should not remain available indefinitely. This observation ties in with and supports the notion (discussed further below) that none of the current UNEs should be designated as "off limits" across-the-board for elimination based on local market conditions (or at least, none would be designated as off limits for more than 12 months after the effective date of the order).

## B. The Role of State Commissions

The NPRM also seeks comment on the role of State commissions concerning implementation of the unbundling requirements. As a threshold matter, the FCC reinforced its prior conclusions that State commissions have the authority to add new UNEs to the default FCC list of UNEs. NPRM at ¶ 75. The FCC also recognized that administering the applicable statutory and regulatory standards would be increasingly burdensome, while acknowledging that State commissions "may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their

jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences." *Id.* Thus, the NPRM asks for comment on the extent to which State commissions should act in creating, removing and implementing unbundling requirements. *Id.* The FCC invited State commissions, in particular, to comment on these issues. NPRM at ¶ 76.

Once the FCC establishes the new default list of UNEs, the question becomes how the UNE list can be modified in a particular situation to meet the "necessary" and "impair" test of Section 252(d)(2) and other factors that are considered. The Ohio commission endorses the approach that the FCC should establish a *flexible* set of UNEs, subject to State commission participation as outlined further below. The Ohio commission notes that the practical problem is how the FCC can possibly apply these factors on a prospective basis, given that each of the issues are fact-intensive and can change over time. Moreover, the underlying issues regarding specific market conditions are uniquely local in nature. Thus, the Ohio commission submits that the FCC should allow State commissions to modify the FCC's default list of UNEs pursuant to general guidelines that are established by the FCC. In other words, the FCC should develop a test or series of factors to be considered by State commissions when making a decision whether to add or subtract an UNE from the FCC's default list.

On a prospective basis, the dynamic technological, competitive and economic factors for determining whether competitors' provision of local telephone service would be impaired without a certain UNE are not generally amenable to a singular, conclusive nationwide determination by the FCC. They are largely fact-intensive or specific to a

particular geographic region or market. State commissions are well-suited to make determinations based on local market conditions and to make adjudicative findings on fact based on a contested hearing process. As such, the FCC should establish the initial UNE list and delegate to States the ability to implement the guidelines/factors for modifying the UNE list in a particular case.

Not unlike the TELRIC methodology, that was developed by the FCC and must be applied by State commissions, State commissions would have to apply the FCC's guidelines regarding modification of the standard UNE list in order to reach a particular result in a particular case. This approach is consistent with the structure and purpose of the 1996 Act. Pursuant to Section 252(d)(2), the FCC clearly has authority to develop standards for determining which UNEs must be provided by incumbent LECs.

Under Section 261(c) of the 1996 Act, State commissions can impose additional requirements necessary to promote local telephone competition as long as those State regulations "are not inconsistent with" the FCC's regulations. Otherwise, State commissions are required to follow and implement FCC regulations in implementing Sections 251 and 252. Requesting carriers who wish to deviate from the FCC's standard UNE list could raise that issue in a State commission proceeding.

As was explicitly acknowledged in the NPRM, State commissions "may be more familiar than the [FCC] with the characteristics of markets and incumbent carriers within their jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences." NPRM at ¶ 75. The Ohio commission believes that the underlying decisions regarding specific market conditions are uniquely local in

nature. Thus, the Ohio commission proposes that the FCC's list of UNEs be made available by incumbent LECs, absent any modification resulting from the fact-intensive determinations of State commissions regarding whether to add or subtract a particular UNE in a particular market given certain conditions.

If the FCC believes that certain UNEs should not be subjected to removal by the State commissions, it could designate those as "core UNEs" that would be part of the default list but would not be subject to removal. For example, if the FCC remains firmly convinced that the absence of loops as a UNE would always impair CLECs' ability to effectively compete for the foreseeable future, the FCC could designate loops as a core UNE. This approach would guarantee that certain UNE(s) would be available on a national basis until further review by the FCC, while recognizing that application of the impairment test to other UNEs may produce different outcomes based on varying market local conditions.

The FCC also asked whether an ILEC's obligation to provide a particular UNE should be subject to a time limit or "sunset" period. NPRM at ¶ 45. The NPRM particularly seeks comment on whether such an automatic phase-out approach is feasible for UNE-P and/or switching as a UNE. Whatever UNEs are currently designated, the FCC may wish to ensure that the default list of UNEs is given a reasonable opportunity to advance the FCC's policy objectives prior to being modified by State commissions. Instead of an automatic sunset period, if the FCC wishes to ensure that certain UNEs are available for a specific time period but reserve the ability of State commissions to modify the list thereafter, it could establish temporary limits on

the removal of UNEs from the default list (*eg.* the default list could be in effect for 12 months or 24 months without any modification of core UNEs, whereas non-core UNEs could be removed sooner based on specific findings made by a State commission).[1] After such a temporary moratorium, if any, State commissions would be able to apply the criteria to modify the default UNE list.

As discussed above, the most prevalent debate in this regard seems to be how long the UNE-P should be retained as a provisional market entry strategy. Given that the UNE-P has already been available for several years and was always considered a transitional mechanism, the Ohio commission believes that it should not be available on a permanent basis and should be phased out over time. The Ohio commission finds merit in the proposal in Paragraph 45 of the NPRM interesting, which would limit a CLEC's reliance on UNE-P to 75% of its customers within 12 months and ramping down to 50% over time. Generally, this type of approach would require a CLEC to increase its reliance on its own resources and decrease reliance on the ILEC's facilities over time. State commissions are probably better suited to administer such a plan.

The Ohio commission was among the few non-industry parties (and ostensibly the only State commission) that advocated in the *UNE Remand* proceeding to eliminate the switch as a UNE, which would have eliminated the UNE-P by implication. *UNE Remand*, Ohio Comments at 7-9. And the FCC did limit the availability of local switching as a UNE in the densest areas of the largest markets for customers having

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1 Pursuant to the FCC's previous statements and policies, the FCC should continue to acknowledge the State commissions' ability to add to the default list of UNEs, consistent with the

more than four lines. *UNE Remand Order,* 15 FC Rcd. at 3822-3831. Thus, the UNE-P is already unavailable in those circumstances (although EELs must be provided in place of unbundled local switching). The positions of the Ohio commission and the FCC are both premised on promoting real development local markets and long-term facilities-based competition, in an economically rational manner. This type of approach avoids encouraging unsustainable competition, while recognizing that interim approaches are necessary and appropriate to facilitate market entry. Given that these issues are now being re-examined six (6) years after passage of the 1996 Act, the FCC should be establishing long term policies that are no longer geared toward temporary, short-term competitive strategies.

In adopting a flexible going-forward approach, the FCC may also wish to adopt reasonable procedural requirements to ensure that State commissions would provide affected ILECs and/or requesting CLECs an opportunity to be heard in an ILEC-specific proceeding before the State commission. Also, in order to promote regulatory stability and certainty for the affected industries, the FCC might want to provide for a 12 month "phase-out period" for individual UNEs offered by particular ILECs. Such a phase out period would commence when a State commission determined that a particular UNE was no longer required. For example, if a State commission does decide to eliminate a particular UNE from the default list based on the applicable statutes and FCC regulations, existing interconnection agreements would not be affected (unless one of the contractual provisions allowed for such a modification during the term) and the

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applicable statutory criteria and FCC guidelines. *See eg. UNE Remand Order,* 15 FCC Rcd. at 3767 (¶

ILEC would have to continue providing the deleted UNE for 12 months.[2] Regulatory predictability and continuity would be balanced with the flexibility to react in a timely manner to material developments in the marketplace. Simultaneously, it would recognize that a one-size-fits-all approach is not fully functional or effective on a national scale. Also, under the Ohio commission's proposal, nothing would prevent a State commission from later re-instituting a UNE that was previously eliminated from the default list, based upon a change in market conditions and subject to appropriate procedural constraints.

An integral component of the Ohio commission's proposal regarding the default UNE list is that the list can be added to, or subtracted from, consistent with an FCC-designed set of criteria/guidelines. The fact that a particular UNE is on the FCC's list would really only mean that there is a presumption that it generally meets the "necessary" and "impair" standards, which presumption can be rebutted where a proper showing is made. Similarly, if an UNE is not on the FCC's list, there would be a presumption that it does not generally meet the "necessary" and "impair" standards. But notwithstanding the applicability of such a presumption, the parties would have an opportunity to present arguments before State commissions supporting a modification to the default list of UNEs applicable to an individual ILEC. This would ensure the most accurate and appropriate decisions are made based on real market conditions at

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154).

2 In conjunction with the earlier suggestion of the Ohio commission that the FCC may want to impose a 12 month moratorium on modifications to the default UNE list (discussed above), this recommendation would mean that the earliest a State commission could remove a UNE from the

the same level that those markets operate. At the same time, the FCC would maintain control over the governing standards and would preserve the role of State commissions in administering Section 251 and 252.

The FCC's formulation of the default UNE list should be done bearing closely in mind that the list can be changed, where justified, in a particular case. In other words, the default list should not be viewed as a final result or the end of the process. The Ohio commission's recommended approach in this case would not preclude a finding that a particular UNE which is not on the default list is necessary to promote competition in a particular market (assuming a demonstration is made that satisfies applicable statutory requirements and FCC standards/guidelines). Conversely, the default list should not be viewed as a long-term guarantee that a particular UNE will always be available for unrestricted use. Thus, the Ohio commission recommends a model that would fully balance the FCC's duty to set forth criterion for determining access to UNEs, while affording flexibility to State commissions in order to promote local telephone competition based on local market conditions.

## C. Other Matters

### 1. New Construction

The FCC seeks comments on whether it should modify or limit ILECs' unbundling obligations going forward so as to encourage incumbents and others to invest in new construction. Among other things, the FCC questions whether it should

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default list would be 12 months from the effective date of the rules to become effective 24 months from the effective date of the rules.

exempt from an unbundling obligation any facilities that an incumbent LEC constructs after a set point in time. NPRM at ¶ 24. The FCC notes that commenting parties should also address whether certain new facilities should be exempt from unbundling obligations. *Id.* Additionally, the FCC seeks comments on whether, in lieu of limiting incumbents' unbundling obligations to encourage investment in new facilities, it might clarify or modify existing pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment. *Id.*

The Ohio Commission maintains that requiring ILECs to provide new facilities as UNEs may not, in all instances, promote facilities-based competition. But the Ohio commission submits that rules need to be carefully crafted to ensure that the ILECs' UNE obligation remains for the provision of existing facilities that are upgraded or refurbished. ILECs should be prepared to demonstrate that the facilities requested are actually new and not refurbished. The Ohio commission once again notes that this example further demonstrates that States are best positioned to make such determinations. Consequently, the FCC should permit State commissions to render decisions on a case-by-case basis as to whether ILECs should be required to provide new construction UNEs.

**2. Toll vs. Local for the Provision of UNEs**

The FCC requests comment on whether it should distinguish between facilities that are used exclusively for "local" services and those that are used exclusively to provide toll services, such as inter-city transmission. NPRM at ¶41. The Ohio commission submits that the since UNE requirements were established by the FCC for

the provision of local service consistent with section 251 of the 1996 Act, mandating such pricing obligations for services dedicated to toll would be erroneous and inappropriate. That is, the Ohio commission maintains that, if facilities are used for the exclusive transport of toll traffic, the ILECs rates for such services should be subject to the FCC's pricing rules established in its various access charge reform proceedings.[3] Using ILEC facilities for predominantly toll service does not advance local competition and does not "impair" a CLEC's provision of local services. Thus, an ILEC should not be obligated to provide those unbundled services under Section 251 as a UNE.

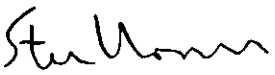
[3] The Ohio commission observes that with the FCC's implementation of the Coalition for Affordable Local and Long Distance Services (CALLS) decision this issue is largely academic. That is, since the CALLS rates for access have reduced originating and terminating access charges to $0.0055 per minute for Bell Operating Companies and GTE (BOCs) and $0.0065 for all remaining price cap carriers, the price difference between ILEC access services and transport UNEs is nominal. Similarly, the price for rate of return carrier access services has been significantly reduced by the FCC's recent decision responding to the multi-Association Group's petition for access reform.

## CONCLUSION

The PUCO wishes to thank the FCC for the opportunity to file comments in this proceeding.

Respectfully submitted,

**ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**



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